Supreme Court, U.S.
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In The
Supreme Court of the United States

J. MUNDY, J. EASTMAN, G. HART, and
CITY OF CARLSBAD POLICE DEPARTMENT,

Petitioners,

v.

MORGAN RHEAD,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Do civil defendants seeking summary judgment under *Heck v. Humphrey*, 512 U.S. 477 (1994) carry their initial burden by presenting evidence of a prior conviction that is inconsistent on its face with the Section 1983 claims alleged in the complaint, or must the civil defendants further prove the factual basis for the conviction?

Are the comments or advice of the trial judge presiding over the prior criminal matter regarding the effect of a nolo contendere plea on the criminal defendant's prospective civil claim for damages under 42 U.S.C. section 1983 relevant to the application of the rule enunciated in *Heck*?

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OPINION BELOW

The August 1, 2003, opinion of the United States Court of Appeals, Ninth Circuit (Ninth Circuit) that gives rise to this petition was not officially published but can be found at *Rhead v. Mundy*, 71 Fed.Appx. 729, 2003 WL 21782677 (9th Cir. 2003), and is also attached to the Appendix, pages 1-3 ("App. 1-3"). The September 11, 2003, order of the Ninth Circuit denying the petitioners' petition for rehearing and petition for rehearing en banc (App. 31) and the underlying April 12, 2002, order of the United States District Court for the Southern District of California granting petitioners' motion for summary judgment (App. 5-30) are also submitted as part of the Appendix.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its opinion reversing the district court's granting of summary judgment in favor of petitioners on August 1, 2003. (App. 1-3.) Thereafter, petitioners filed a timely petition for rehearing and rehearing en banc and the Ninth Circuit issued an order denying the motion for rehearing on September 11, 2003. (App. 31.) The statutory provision conferring jurisdiction upon this Court to review the judgment and order in question by writ of certiorari is 28 U.S.C. section 1254(1).

RELEVANT LEGAL AUTHORITIES

48 U.S.C. section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Penal Code section 148, subd.(a)(1):

> Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

California Penal Code section 1016:

> There are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction: . . .
>
> 3. Nolo contendere, subject to the approval of the court. The court shall ascertain whether the defendant completely understands that a plea of nolo contendere shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty. The legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea and any admissions required by the court during any

> inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

California Penal Code section 1192.5:

> Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, other than a violation of paragraph (2), (3) or (6) of subdivision (a) of Section 261, paragraph (1) or (4) of subdivision (a) of Section 262, Section 264.1, Section 286 by force, violence, duress, menace or threat of great bodily harm, subdivision (b) of Section 288, Section 288a by force, violence, duress, menace or threat of great bodily harm, or subdivision (a) of Section 289, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it. . . . If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea. . . .

STATEMENT OF CASE

This petition arises from the district court's granting of summary judgment in favor of petitioners Officers Mundy, Eastman and Hart and the City of Carlsbad Police Department (collectively, "Officers") and the Ninth Circuit's reversal of that decision.

According to allegations in Rhead's complaint, Officer Mundy stopped Rhead for an inoperable tail light on his moped. During the course of the stop, Officer Hart arrived. Rhead told the Officers he was carrying some marijuana, which one of the Officers found. After a brief colloquy ending in a sarcastic comment by Rhead, the Officers took Rhead to the ground with one holding him in a headlock and the other holding his legs. Rhead twisted loose and started to run, but was then subdued by the Officers' use of clubs, flashlights and pepper spray. Eventually, after additional police officers arrived and applied force, Rhead was handcuffed and placed in the police car. (App. 6-7.)

Rhead was charged with felony resisting or obstructing an executive officer and misdemeanor battery against a police officer. Prior to trial, Rhead accepted a plea bargain and pled nolo contendere to the lesser included offense of misdemeanor resisting or obstructing a peace officer, under California Penal Code section 148(a). (App. 7-8, fn. 4.) Rhead then sued the Officers under 42 U.S.C. section 1983 (Section 1983 claim), alleging that they violated his civil rights by subjecting him to unreasonable search and seizure, excessive force, as well as due process violations based on the filing of a false report regarding the incident. Rhead also alleged that the Officers acted pursuant to official policy, thereby exposing the City of Carlsbad Police Department to liability for the civil rights

violations under *Monell v. Department of Social Service of City of New York*, 436 U.S. 658 (1978). Finally, Rhead alleged that the Officers' actions were negligent and actionable as false arrest and battery under California law. (App. 8-9.)

The Officers moved for summary judgment, submitting evidence of Rhead's nolo contendere plea to a violation of resisting arrest. The Officers argued that, under *Heck*, Rhead could not pursue the Section 1983 claims in his complaint as they would necessarily imply the invalidity of his conviction. The Officers further argued that this conviction also barred Rhead's state law claims under relevant state law principles. (App. 9.)

In considering the motion, the district court noted an excessive force claim based on conduct during an arrest would necessarily imply the invalidity of a conviction for resisting arrest under California law, whereas an excessive force claim based on force after an arrest would not necessarily be inconsistent. (App. 9-13.) The district court also noted that, for purposes of applying *Heck*, Rhead's nolo contendere plea had the same legal effect as a guilty plea or jury verdict of guilt. (App. 13-14.)

The district court found the Officers carried their initial burden on summary judgment by presenting evidence of Rhead's nolo contendere plea in the face of Rhead's allegations regarding excessive force and wrongful arrest. (App. 25-26.) Accordingly, Rhead could only pursue his excessive force claim if he presented evidence that some or all of the Officers' force occurred after his arrest. (App. 19-21.) However, Rhead failed to present any admissible evidence to support a claim of post-arrest force. (App. 21-22.) The district court further found that Rhead's own

allegations did not support an inference that the Officers exerted post-arrest force, as the complaint set forth a single continuous event that concluded with Rhead's handcuffing and placement in the police car. (App. 22-23.)

The district court also found Rhead's due process claims based on allegedly false police reports and malicious prosecution to be barred by *Heck* in light of the conviction for resisting arrest. (App. 26-28.) The district court declined to exercise supplemental jurisdiction over the state law false arrest claim, and dismissed the state law negligence and battery claims under state law principles. (App. 28.) Finally, the district court dismissed the *Monell* claim on the grounds that Rhead had not presented any evidence of improper municipal policy and the state law respondeat superior claims in the absence of any underlying individual liability. (App. 28-29.) The district court accordingly entered judgment in favor of the Officers. (App. 4.)

Rhead appealed the judgment to the Ninth Circuit, and on August 1, 2003, the Ninth Circuit issued a majority opinion reversing and remanding the matter. (App. 1-3.) The majority found that the Officers had the burden of "showing that the success by Rhead in his §1983 action would *necessarily* imply the invalidity of his conviction." (App. 2 [emphasis in original].) The majority concluded the Officers failed to carry this burden since neither the plea document nor the plea colloquy revealed the factual basis for the plea. (App. 2.) The majority found further support for its conclusion in the fact that the criminal trial court "apparently saw no bar to any civil proceeding arising from Rhead's nolo plea." (App. 2.)

Taking a contrary view, the dissent pointed out that Rhead's own allegations supported the district court's

conclusions regarding the relation and inconsistency between Rhead's conviction and his civil suit. Specifically, Rhead had alleged a continuous event involving force that culminated in his handcuffing and arrest. The dissent also found the criminal trial court's statements to be inconsequential in light of the controlling law contained in *Heck*, even assuming these statements had the effect of misleading Rhead. (App. 2-3.)

Following the Ninth Circuit's opinion, the Officers timely filed a petition seeking a rehearing by the panel and by the Ninth Circuit en banc. On September 11, 2003, the Ninth Circuit issued its order denying this request, with one Justice again dissenting. (App. 31.)

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Decision Improperly Places a Burden on Defendants Seeking Dismissal Under *Heck* to Prove Affirmatively and Conclusively that a Section 1983 Claim that is Facially Inconsistent With a Prior Conviction is in Fact Inconsistent

Heck established that a convict cannot seek damages under a Section 1983 claim if the success of this civil claim would be inconsistent with and thus "imply the invalidity" of the earlier conviction or any elements of the crime. *Heck*, *supra*, 512 U.S. at 487. Under California law, a nolo contendere plea is the same as a guilty plea or conviction following a jury trial. California Penal Code section 1016(3); *Nuno v. County of San Bernardino*, 58 F.Supp.2d 1127, 1133 (C.D. Ca. 1999). In the present case, it is undisputed that Rhead's suit set forth Section 1983 claims based on Fourth Amendment violations allegedly resulting

from an incident that ultimately led to his nolo contendere plea to resisting arrest.

As this Court observed in *Heck*, one convicted for resisting arrest under the ordinary iteration of the crime is precluded from later seeking damages under Section 1983 on the theory that the arresting officers violated the convict's Fourth Amendment rights, since the success of the civil claim would "necessarily imply" the invalidity of the earlier conviction. *Heck*, *supra*, 512 U.S. at 486, fn. 6. The inconsistency arises out of the fact that a conviction for resisting arrest requires that the officer have been effecting a lawful arrest, whereas a successful Section 1983 claim for a Fourth Amendment violation would require proof that the arrest was unlawful in some fashion. *Id.* In California, a conviction for resisting arrest is inconsistent with later challenges to either the arrest itself or the amount of force used to effect the arrest. As a number of courts have noted, "if a peace officer uses excessive force to make an arrest, that arrest is unlawful and the arrestee cannot be convicted of violating [California Penal Code] §148. . . ." *Franklin v. County of Riverside*, 971 F.Supp. 1332, 1336 (C.D.Cal. 1997), *aff'd Franklin v. Smith*, 161 F.3d 12 (9th Cir. 1998); *see also People v. Olguin*, 119 Cal.App.3d 39, 44 (1981); *Nuno*, *supra*, 58 F.Supp.2d at 1133; *Susag v. City of Lake Forest*, 94 Cal.App.4th 1401, 1408 (2002).

The Ninth Circuit's insistence that the Officers go beyond the face of Rhead's conviction and prove the detailed factual basis for this conviction is not sound. While the Ninth Circuit did not expand upon the legal basis for its rationale, it cited *Sanford v. Motts*, 258 F.3d 1117 (9th Cir. 2001). *Sanford* involved an excessive force claimant convicted for resisting arrest who survived a

motion for summary judgment under *Heck* because the evidence in the record presented the possibility that the defendant officer punched the claimant after the arrest. The Ninth Circuit concluded that a claim for excessive force that occurred after an arrest for resisting arrest would not necessarily imply that the officer acted unlawfully during the original arrest. *Sanford*, *supra*, 258 F.3d at 1119-1120. Thus, *Sanford* draws a distinction between claims based on force after arrest, which are not precluded by *Heck*, and claims based on force during the arrest, which are precluded by *Heck*.

For purposes of the present petition, the Officers accept the general proposition that a convict claimant may state a viable claim for excessive force based on force exerted after the arrest. However, the Ninth Circuit erred in evaluating how this theoretical possibility intersects with party's respective burdens on summary judgment. Specifically, the Ninth Circuit's decision to place the initial burden on the Officers to go beyond the fact of Rhead's resisting arrest conviction and Rhead's own allegations and conclusively prove that the conviction cannot in fact be reconciled with some undisclosed claim is inconsistent with this Court's analysis in *Heck* and inconsistent with other courts that have considered this issue. Furthermore, this allocation of burdens will ensure that the *Heck* issue goes to the jury in derogation of policies favoring pre-trial resolution of this issue. To avoid these consequences, the Officers urge this Court to address the application of *Heck* in the summary judgment context as presented by this petition, and resolve the matter in favor of the Officers.

1. Under *Heck*, a Convict Claimant Fails to State a Cognizable Section 1983 Claim Unless the Claim, if Successful, Would Not Necessarily Imply the Invalidity of the Prior Conviction

Although *Heck* did not squarely address the issue, the Ninth Circuit's proclamation that the Officers were not entitled to summary judgment unless they went beyond the fact of Rhead's conviction for resisting arrest and proved the underlying factual basis for Rhead's nolo contendere plea cannot be reconciled with the rationale of *Heck*. *Heck* spoke exclusively in terms of the convict claimant's burden to present a cognizable claim in the face of a prior conviction. In affirming a pretrial dismissal of the complaint, the Court noted that if a convict claimant "seeks damages in a Section 1983 suit, the district court must consider whether a judgement would necessarily imply the invalidity of his conviction or sentence", for "if it would, the complaint must be dismissed unless the *plaintiff* can demonstrate that the conviction or sentence has already been invalidated." *Heck*, *supra*, 512 U.S. at 487 [emphasis added]. Notably, the Court did not state that a civil defendant seeking pretrial dismissal has the burden of demonstrating that the conviction has not been invalidated.

The Court did not expressly discuss how the district court resolves the threshold issue of whether the Section 1983 claim would necessarily imply the invalidity of a prior conviction. Similarly, the Court did not expressly discuss the respective burdens of the parties in the context of a pretrial motion on this issue. However, as noted above, this Court cited the example of a conviction for resisting arrest and a Section 1983 claim for Fourth Amendment violations as illustration of a claim that would necessarily

imply the invalidity of an earlier conviction. *Heck*, *supra*, 512 U.S. at 486, fn.6. This hypothetical demonstrates that the threshold analysis of the inconsistency between certain types of Section 1983 claims and convictions can be resolved by comparing the nature of the claim and the elements of the conviction. Stated another way, the *Heck* illustration demonstrates that certain types of Section 1983 claims are facially inconsistent with certain types of convictions.

Consistent with the Officers' position, the Court observed that it was not creating "an exhaustion requirement upon §1983," but was instead denying "the existence of a cause of action" under such circumstances. *Heck*, *supra*, 512 U.S. at 489. This comment confirms that the *Heck* analysis defines the basic requirements of a valid Section 1983 claim in the first instance, and not an affirmative defense to liability. Consequently, under *Heck*, it should be the convict claimant's obligation to present a claim that is not inconsistent with a prior conviction or to demonstrate that the inconsistent prior conviction has been set aside. If the convict claimant fails in this preliminary requirement and alleges a Section 1983 claim that is facially inconsistent with a prior conviction that has not been set aside, the district court should dismiss such allegations as failing to state a claim unless the claimant can demonstrate how the facially inconsistent claim could succeed without implying the invalidity of the prior conviction. Nothing in *Heck* indicates that the convict claimant is entitled to proceed toward trial until the civil defendants can conclusively prove that the specific facts underlying the prior conviction would necessarily conflict

with any and all hypothetical theories of liability encompassed within the general ambit of the alleged constitutional violations.

2. Other Legal Authority Has Determined that Pretrial Dismissal Is Appropriate When a Party Convicted of Resisting Arrest Brings a Section 1983 Claim for Excessive Force, Unless the Claimant Presents Evidence that the Section 1983 Claim Arises from Post-Arrest Force

The Ninth Circuit's analysis is also inconsistent with other legal authority that has considered the precise issue of the interplay between the *Heck* issue and the parties' burdens on summary judgment. In *Susag v. City of Lake Forest*, *supra*, the California Court of Appeals considered and rejected the Ninth Circuit's analysis. The convict claimant in *Susag* argued that his conviction for resisting arrest did not necessarily permit summary judgment on his excessive force claim because the criminal record did not disclose the specific factual basis for his conviction. Disagreeing, the California court held that "any claim of excessive force based on discrete acts that occurred immediately preceding [the] arrest is barred by . . . *Heck*". *Susag*, *supra*, 94 Cal.App.4th at 1410. In response to the convict claimant's assertion that the excessive force claim could theoretically survive under a *Sanford* post-arrest force theory, the court noted that the convict claimant "has alleged no claims of excessive force that took place after he was finally subdued and placed in the patrol car." *Id.* The court summarized the appropriate burdens under *Heck* by concluding "[o]nce the defendants met their burden of proving [the convict claimant] had an undisturbed conviction under [California] Penal Code section 148, subdivision

(a), the burden shifted to [the convict claimant] to provide evidence of excessive force that would not necessarily imply the invalidity of his conviction." *Id.*

While applied to California summary judgment procedure, the analysis in *Susag* can be applied equally to the federal context. California summary judgment procedure is largely identical to federal law on the point and to the extent it differs, California law imposes a greater burden on the moving party than federal law. *See, Aguilar v. Atlantic Richfield Company*, 25 Cal.4th 826, 843-849, 852-855 (2001). Consequently, under the rationale of *Susag*, the Officers met their threshold burden on summary judgment by presenting evidence of Rhead's conviction, through a nolo contendere plea, for resisting arrest. Under *Heck*, this undisturbed conviction would preclude any claims based on force exerted during the arrest. Furthermore, as the district court and the Ninth Circuit dissent both noted, Rhead's allegations described only a single continuous display of force, culminating in his arrest. (App. 2-3, 21-23; *see also, Cunningham v. Gates*, 312 F.3d 1148, 1154-1155 (9th Cir. 2002).) Notably, the Ninth Circuit decision did not find that Rhead had presented allegations or evidence of any post-arrest force. Thus, under the proper analysis set forth in *Susag*, if the viability of Rhead's claim was dependent upon a force exerted after the arrest, he was obligated to provide the district court with supporting evidence of this theory or face dismissal of his complaint.

B. The *Susag* Analysis Is Consistent with *Heck* and Permits Pretrial Resolution of the Issue, and Should Be Adopted by this Court as the Proper Method of Applying *Heck* in the Summary Judgment Context

The *Susag* analysis comports with the holding and policy of *Heck* while avoiding the problematic ramifications of the Ninth Circuit's approach. First, the *Susag* approach to applying *Heck* in the summary judgment context is workable. The illustrations in *Heck* demonstrate that certain types of convictions are, or are not, facially inconsistent with certain types of Section 1983 claims. *Heck, supra*, 512 U.S. at 486, fn.6, 487, fn.7. Further, *Heck* involved a pretrial dismissal, confirming that its analysis is suited to motion resolution. When, as here, the motion is based upon comparing the conviction to the allegations of the Section 1983 claim, the analysis is purely legal and particularly well-suited to a pretrial determination. The *Susag* analysis thus allows pretrial determination without elaborate factual development.

Second, the *Susag* approach is an inquiry that facilitates pretrial resolution of the *Heck* issue by placing the burden to raise triable issues of material fact regarding consistency between the prior conviction and the present claim upon the party most able to effectively address this issue. In this regard, the *Susag* analysis requires the convict claimant to respond to the *Heck* analysis once the civil defendants demonstrate this threshold inconsistency between the prior conviction and the present claim. If, notwithstanding a facial inconsistency, the convict claimant has a colorable claim that may in fact be consistent with a prior conviction, the convict claimant is the party that can and should bear the burden of demonstrating a

triable issue of material fact regarding this possibility. By way of contrast, the Ninth Circuit's analysis obviates the convict claimant's need to provide any response to an obvious facial inconsistency between a present claim and a prior conviction, since the civil defendants will not have carried their initial burden on summary judgment until they construct a factual basis for the conviction adequate to defeat all theoretical claims.

As *Heck* stands for the proposition that there is no cognizable claim until a convict claimant presents a Section 1983 claim that would not necessarily imply the invalidity of a standing conviction, reserving determination of this threshold issue until trial advances no legitimate policy. Indeed, this Court has concluded, albeit in a different context, that swift pretrial resolution of issues governing prospective Section 1983 liability are favored. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) [discussing policies favoring pretrial adjudication of qualified immunity defense]. If public policy implicated by Section 1983 claims favors pretrial adjudication of an issue such as the affirmative defense of qualified immunity, an issue that defines the threshold existence of a cognizable Section 1983 claim should not be relegated to inevitable trial litigation through the Ninth Circuit's view of the parties' burdens on summary judgment.

Third, the *Susag* approach avoids creating an inappropriate incentive that would result from the Ninth Circuit's analysis and related reliance upon the blank fact section in the plea document. California law does not require the criminal trial court to make factual findings as part of accepting a guilty or nolo contendere plea to a misdemeanor charge. California Penal Code section

1192.5; *In re Gross*, 33 Cal.3d 561, 567 (1983). Consequently, if the Ninth Circuit's view were correct, convict claimants in a jurisdiction such as California could effectively avoid *Heck* by pleading guilty or nolo contendere to misdemeanors, since this would eliminate any factual findings that the Ninth Circuit views as necessary to the granting of summary judgment.

This consequence would create further mischief at trial. The unstated but inevitable consequence of the Ninth Circuit's decision is that the jury will be assigned the task of determining the factual basis for the prior conviction. It is entirely unclear how the parties could effectively litigate this issue in the absence of any criminal record. Efforts to recreate accurately the criminal plea and all underlying considerations would consume significant trial resources. Further, this would undoubtedly confuse the jury by simultaneous presentation of arguments and evidence relating to both the earlier criminal proceedings and the current civil claim. Finally, allowing the convict claimant resort to a civil jury to urge an unsupported basis for an earlier plea and conviction would be tantamount to a collateral attack upon the plea and conviction. Such a result would be in derogation of the principles that animated *Heck*'s holding. *See*, *Heck*, *supra*, 512 U.S. at 484-487.

Of course, the alternative response of precluding any litigation at trial of the factual basis for the conviction, would be an even greater perversion of justice, since the convict claimant will have both created and profited by this dilemma by submitting a plea that did not require factual findings. Rather than provide an incentive to a convict claimant to accomplish the foregoing by entering a nolo contendere plea and effectively precluding summary

judgment under *Heck*, the convict claimant should bear the burden on summary judgment to come forward with evidence of a factual scenario under which a facially inconsistent conviction and Section 1983 claim could be reconciled or be otherwise barred from pursuing the Section 1983 claim. As applied to this case, Rhead should have been required to present evidence supporting an excessive force claim based on post-arrest force.

THE NINTH CIRCUIT IMPROPERLY ATTRIBUTED SIGNIFICANCE TO THE CRIMINAL TRIAL COURT'S COMMENTS IN CONSIDERING THE APPLICABILITY OF *HECK*

To support its conclusion, the Ninth Circuit referred to statements by the criminal trial court regarding the viability of Rhead's prospective civil suit, concluding the criminal trial court would have been in a superior position to evaluate the effect of the nolo contendere plea on Rhead's civil claims. This rationale cannot withstand scrutiny as it replaces Rhead's burden to demonstrate consistency with a presumption of consistency based upon speculation regarding the criminal trial court's understanding of *Heck* and its application to Rhead's plea. Such speculation is necessarily unsound in light of the absence of any indication Rhead informed the trial court about the nature of his prospective civil claim as well as the absence of any indication the criminal trial court had in fact considered the applicability of *Heck*.

Heck nowhere indicates that the criminal trial court's comments while accepting a plea play any role in its analysis, nor would such a conclusion be sound. *Heck* requires consideration of at most three factors: 1) the

elements of the crime for which the claimant was convicted; 2) the elements of the Section 1983 claim; and 3) the status of the conviction. The criminal trial court's views bear no relation to any of these considerations and as such should not be considered in applying *Heck*. Furthermore, nothing commends relying upon the criminal trial court's general statements. In reviewing and considering the propriety of an offered plea, the criminal trial court is understandably concerned with matters other than the pleading party's future civil claims against parties that are not represented at the criminal stage. It is unfair to the criminal trial court to expect it to correctly apply *Heck* in an advisory capacity in this setting. However, it is even more unfair to bind civil defendants who are not involved in the plea process by the criminal trial court's comments.

CONCLUSION

The petition for writ of certiorari should be granted because the Ninth Circuit's opinion in this matter is inconsistent with *Heck* and other legal authority that has considered the interplay between the *Heck* analysis and the parties' burdens on summary judgment. The ultimate effect of the Ninth Circuit's analysis is to greatly limit the circumstances under which civil defendants could successfully obtain pretrial dismissal of Section 1983 claims under *Heck*. Moreover, the Ninth Circuit's analysis would create significant mischief in cases involving pleas for

which factual bases are not required by state law. To prevent this outcome, the writ should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MORGAN RHEAD, Plaintiff-Appellant, v. J. MUNDY; J. EASTMAN; G. HART; CITY OF CARLSBAD POLICE DEPARTMENT, Defendants-Appellees.	No. 02-55817 D.C. No. CV-01-00629-LAB **MEMORANDUM***

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted July 8, 2003

(Filed Aug. 1, 2003)

Pasadena, California

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

In *Heck v. Humphrey,* 512 U.S. 477 (1994), the Supreme Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff *would necessarily imply the invalidity of his conviction* or sentence; if

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487 (emphasis added). Morgan Rhead appeals from the district court's grant of summary judgment to the defendants under *Heck*. We reverse.

The defendants have the burden of showing that success by Rhead in his § 1983 action would *necessarily* imply the invalidity of his conviction under California Penal Code § 148(a). *Sanford v. Motts,* 258 F.3d 1117, 1119 (9th Cir. 2001); *see also Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1105 (9th Cir. 2000). They have not done so here. Nothing in the record reveals the factual basis of Rhead's nolo plea to § 148(a). The fact section of the plea document was left blank, and no facts were presented at the plea colloquy in front of the California Superior Court. The state-court judge, who was in the best position to understand the factual basis of Rhead's conviction, apparently saw no bar to any civil proceeding arising from Rhead's nolo plea. We therefore hold that Rhead's § 1983 suit, if successful, would not necessarily imply the invalidity of his conviction and thus is not *Heck*-barred.

REVERSED and REMANDED.

SILVERMAN, Circuit Judge, dissenting.

I respectfully dissent. Rhead alleged in paragraphs nine and ten of his complaint as follows: He gave a sarcastic answer to Officer Hart. Hart and other officers responded by forcefully taking Rhead to the ground, beating him with flashlights and clubs, spraying him in the eyes with pepper spray, and painfully applying nunchakus to

his arm. The beating culminated in his being handcuffed and placed in the police car. As alleged by Rhead himself, this was one continuous event without any break in the action. *See Cunningham v. Gates,* 312 F.3d 1148, 1154-55 (9th Cir. 2002). Under California law, Rhead's conviction for violating California Penal Code § 148 necessarily established the lawfulness of the officers' conduct. *Susag v. City of Lake Forest,* 115 Cal. Rptr. 269, 273 (Cal.App. 2002) Therefore, a judgment in favor of Rhead in this civil case would necessarily imply the invalidity of the conviction. For that reason, the lawsuit is barred by *Heck v. Humphrey,* 512 U.S. 477 (1994).

It does not matter that the state court judge advised (or even misadvised) Rhead about the availability of civil remedies against the officers. If the judge misled him about the effect of a no contest plea, Rhead might have grounds to withdraw his plea and go to trial. However, in no event is the state court judge empowered to overrule the United States Supreme Court's decision in *Heck.*

I would affirm the district court.

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Morgan Rhead

V.

J. Mundy; J. Eastman; G. Hart; City of Carlsbad Police Department and Does 1-50, inclusive

JUDGMENT IN A CIVIL CASE

(Filed Apr. 12, 2002)

CASE NUMBER:
01-cv-629-(LAB)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendants' motion for summary judgment is **GRANTED**. Rhead's claims are **DISMISSED WITHOUT PREJUDICE** to future demonstration that his conviction has been invalidated.

April 12, 2002
Date

W. Samuel Hamrick, Jr.
Clerk

J. Haslam /s/ J. Haslam
(By) Deputy Clerk
ENTERED ON April 12, 2002

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MORGAN RHEAD, Plaintiff, v. J. MUNDY, J. EASTMAN, G. HART, CITY OF CARLSBAD POLICE DEPARTMENT and DOES 1-50, inclusive, Defendants.	Case No. 01cv0629-(LAB) **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Filed Apr. 12, 2002) [Dkt. No. 20]

This matter is before the court on Defendants' Motion For Summary Judgment ("Motion") in this 42 U.S.C. § 1983 action. Plaintiff Morgan Rhead ("Rhead") sues defendants City of Carlsbad Police Department and Officers J. Mundy, J. Eastman, and G. Hart for money damages, alleging personal injuries and violation of his federal constitutional rights, with pendant state law claims, in connection with the conduct of arresting officers. Plaintiff filed Opposition to the Motion, and Defendants filed a Reply. All parties have consented to the jurisdiction of the undersigned Magistrate Judge for all purposes. Dkt. No. 9. The court finds the issues appropriate for decision on the papers and without oral argument, pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, Defendants' Motion is ***GRANTED***.

I. BACKGROUND

For purposes of deciding summary judgment motions, the court views the evidence in the light most favorable to the non-moving party to determine whether there exist

triable issues of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Rhead was riding a moped the night of April 11, 2000 when Officer Mundy stopped him for having an inoperable tail light. Officer Mundy indicated he would let Rhead go with a warning, but first asked Rhead if he had any illegal substances. Rhead ultimately admitted to Officer Mundy he had a small amount of Mexican marijuana. Officer Hart joined Officer Mundy at the Rhead stop. One of the officers searched Rhead and found a baggy with a small amount of a substance Rhead stated was "some good Mexican weed."[1] Compl. ¶ 9. A "grinning" Officer Hart said he thought it looked like Sun Valley weed, and continued to insist the marijuana was of a specific type he sarcastically said looked "really good to him." Compl. ¶ 9. Rhead responded that if he was interested, Officer Hart could smoke some of it. Rhead "instantly saw a bright light in his eyes and then an intense pain to his left eye." Compl. ¶ 9.

The officers grabbed Rhead to the ground. Officer Hart put him in a headlock and twisted tightly. Officer Mundy held Rhead's legs down. Rhead was afraid, managed to twist loose and tried to run, but the officers beat him with their flashlights and clubs, and sprayed him with pepper spray. Compl. ¶ 10. The officers demanded he remain still, but when he stopped moving, they would hit him. One of the officers grabbed Rhead by the hair and pushed his face into the cement. Rhead cried for help.

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[1] Rhead appears to have testified at his deposition that Officer Mundy had already retrieved the baggy before Officer Hart arrived. *See* Opp. Ex. 10, p. 163.

Another police car pulled up, and a third officer got out and jumped on Rhead, while the others continued to hit, beat, and spray him. Yet another police car pulled up, and a fourth officer joined in the fray. One of the officers used his nunchakus to squeeze Rhead's arm, causing severe pain. Compl. ¶ 10, None of the four officers tried to handcuff Rhead. Witnesses gathered. Two more police cars arrived, and those two officers yelled at the other four to get off Rhead. The last two officers handcuffed him and put him in one of the cars. Rhead was taken to a fire station for treatment of his injuries. Compl. ¶ 10.

Rhead was charged with two felony counts for violation of CAL. PENAL CODE § 69,[2] and one misdemeanor count for violation of CAL. PENAL CODE § 243(b), battery against a police officer.[3] Shortly before trial, the prosecutor offered Rhead a plea bargain, and Rhead accepted. The information was amended to add a fourth misdemeanor count for violation of CAL. PENAL CODE § 148, resisting arrest, stipulated on the record by the District Attorney and Rhead's counsel to be a "lesser included offense" of CAL. PENAL CODE § 69.[4] Rhead pled *nolo contendere* to the single

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[2] "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable [as a felony]." CAL. PENAL CODE § 69.

[3] The court takes judicial notice of the criminal complaint in San Diego County Superior Court case number CN113162, provided as Exhibit 1 to Rhead's Opposition. FED.R.EVID. 201,

[4] The court takes judicial notice of the certified copy of the reporter's transcript of Rhead's October 12, 2000 change of plea and sentencing hearing, provided as Exhibit "A" to Defendants' Reply. FED. R. EVID. 201. Rhead's change of plea/sentencing hearing transcript

(Continued on following page)

count of violating CAL. PENAL CODE § 148,[5] and the other charges were dropped. On October 12, 2000, he was sentenced to two years probation and fined $250.00. Mot. Ex. "C".

Rhead's unverified Complaint alleges in Count One violations of his Fourth and Fourteenth Amendment rights for excessive use of force and malicious prosecution, causing him to suffer false arrest and unlawful search and seizure. Rhead further alleges Defendants' false accusation of battery on a police officer and their filing of an allegedly false police report further maliciously violated his Fourteenth Amendment right to due process. Compl. ¶ 14.

In Count Two, Rhead alleges "defendant City of Carlsbad, through its police department, has unlawful policies, customs and habits of improper and inadequate hiring, training, retention, discipline and supervision of its police officers, including the individual defendants" named in his Complaint. Rhead alleges these deficiencies "caus[ed] the constitutional deprivations, injuries and damages" alleged in Count One. Compl. ¶ 18. Count Three

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establishes his knowing plea was to obstruction of a peace officer performing his duties: "THE COURT: How do you plead that on or about April 11, 2000, that you did unlawfully obstruct a peace officer acting within the course and scope of his duties, in violation of Penal Code section 148(a)? As I understand the plea would be a no contest, correct? THE DEFENDANT: Yes, Sir. THE COURT: And you plead guilty with the understanding that it is a no contest plea, correct? THE DEFENDANT: Yes, Your Honor." Reply, Ex. "A" 3:4-12.

[5] The court takes judicial notice of the no contest pleas in San Diego County Superior Court case number CN113162, provided as Exhibit 9 to Rhead's Opposition FED.R.EVID. 201

alleges a state law negligence claim, Count Four a state law false arrest claim, and Count Five a state law battery claim. Compl. pp. 6-7.

Defendants' unchallenged Separate Statement of Material Facts filed in support of their Motion establishes six "material facts": Rhead pled no contest to the § 148(a) charge; he received a sentence of two years' probation; his first cause of action is a § 1983 claim for excessive use of force and malicious prosecution; he alleges his due process rights were violated by police officers falsely accusing him of battery on a police officer and filing a false police report; his second cause of action is a *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978) claim against the City; and his state law claims are false arrest, negligence, and negligent hiring, retention and supervision. Sep. Stmt. pp. 1-2. Defendants move for summary judgment on the grounds: (1) a judgment in favor of Rhead on his 42 U.S.C. § 1983 claim would necessarily imply the invalidity of the judgment in his criminal case, a result prohibited by *Heck v. Humphrey*, 512 U.S. 477 (1994); and (2) "state law claims of battery and related claims arising from the alleged use of excessive force during the arrest cannot be maintained after a Penal Code § 148(a) conviction." Mot. 2:15-18.

II. DISCUSSION

A. Legal Standards

1. 42 U.S.C. § 1983

To prevail on a claim brought pursuant to 42 U.S.C. § 1983, the claimant must prove conduct by a person acting under color of state law deprived the claimant of some right, privilege, or immunity protected by the Constitution

or laws of the United States. 42 U.S.C. § 1983; *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000); *West v. Atkins*, 487 U.S. 42, 49 (1988). There appears to be no dispute that the defendant officers were acting under color of state law when they stopped and arrested Rhead.

The validity of a standing conviction or sentence cannot be attacked through a 42 U.S.C. § 1983 claim. The Supreme Court has held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness could render a conviction or sentence invalid, a 42 U.S.C. § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. The requirement of exoneration promotes judicial economy and "a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck* 512 U.S. at 484 (citation omitted).

A plaintiff convicted of resisting arrest, under a state statute which makes the lawfulness of the arrest an element of the crime, who subsequently alleges use of excessive force during the arrest, attacks the criminal conviction. The claim is not cognizable in a 42 U.S.C. § 1983 action without a showing the conviction was invalidated. *Heck*, 512 U.S. at 486, n.6 (observing by way of illustration that a successful § 1983 action for use of excessive force during the arrest which a plaintiff was

convicted of resisting would necessarily imply the invalidity of the plaintiff's conviction).[6]

> In California, the lawfulness of an arrest is an essential element of the offense of resisting or obstructing a peace officer. If the officer was not performing his or her duties at the time of the arrest, the arrest is unlawful and the arrestee cannot be convicted under Penal Code section 148, subdivision (a). "Excessive force by a police officer . . . is not within the performance of the officer's duty."

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[6] "An example of . . . a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful -- would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest . . . . He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, the § 1983 action will not lie." *Heck*, 512 U.S. at 487, fn.6. *See People v. Wilkins*, 14 Cal.App.4th 761, 776 (1993) (violation of section 148 requires "as an element that the officer at the time of the offense be engaged in the lawful performance of his duties"); *Olguin*, 119 Cal.App.3d at 44 ("An officer cannot be engaged in the lawful performance of her duties if she is subjecting an arrestee to excessive force"); *Nuno*, 58 F.Supp. at 1133 (where the lawfulness of the resisted arrest was a prima facie element of the resisting-arrest offense, "a successful section 1983 action, premised on a police officer's use of excessive force during an arrest, would necessarily imply the invalidity of the plaintiff's conviction for resisting arrest in a state where the lawfulness of the resisted arrest was a prima facie element of the resisting-arrest offense . . . . California is such a state").

Susag v. City of Lake Forest, 94 Cal.App.4th 1401, 1408 (2002) (emphasis added) (quoting *People v. Olguin*, 119 Cal.App.3d 39, 44 (1981)) ("Since the officer must be acting in the performance of his duty, the use of excessive force renders it impossible for an arrestee to violate section 148"); *see also Nuno v. County of San Bernardino*, 58 F.Supp.2d 1127, 1133 (C.D. Cal. 1999) (granting defendants' motion to dismiss probationer's civil rights claims after probationer had pled *nolo contendere* to obstructing a peace officer and carrying a concealed firearm because allegations that a plaintiff "was subjected to excessive force ***during*** his arrest, if proven, would necessarily imply the invalidity of his obstruction of a peace officer conviction") (emphasis added).

In *Franklin v. County of Riverside*, 971 F.Supp. 1332, 1335 (C.D. Cal. 1997), the plaintiff was convicted of obstructing a peace officer under CAL. PENAL CODE § 148 and assault on a peace officer under CAL. PENAL CODE § 241(b). He then filed a 42 U.S.C. § 1983 complaint alleging that defendant officers used excessive force when they arrested him and that the county had not adequately trained and disciplined deputy sheriffs who use excessive force. The *Franklin* court granted defendants' motion to dismiss. "[A] peace officer is not engaged in the performance of those duties, within the meaning of these statutes, if he arrests a person unlawfully or uses excessive force in making the arrest. Therefore, if a peace officer uses excessive force to make an arrest, that arrest is unlawful and the arrestee cannot be convicted of violating either P.C. § 148 or P.C. § 241(b)." *Franklin*, 971 F.Supp. at 1336 (citations omitted).

However, if the alleged excessive force occurred ***after*** the arrest, a 42 U.S.C. § 1983 claim is cognizable. *See Sanford v. Motts*, 258 F.3d 1117 (9th Cir. 2001) (finding

that a claim of excessive force which arose after arrest did not "necessarily imply the invalidity" of the plaintiff's "resisting, obstructing and delaying" arrest conviction pursuant to CAL. PENAL CODE § 148(a)(1)). A § 1983 claim challenging the unreasonableness of a search or seizure may be prosecuted before a conviction is invalidated if it does not necessarily imply the invalidity of the conviction or sentence.[7] *Heck*, 512 U.S. at 486, n.7; *see also, e.g., Smithart v. Towery*, 79 F.3d 951, 952-53 (9th Cir. 1996) (holding *Heck* did not bar the plaintiff's claim that defendant police officers had used excessive force during his arrest, when plaintiff's conviction was for assault with a deadly weapon, because "a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart's arrest or conviction" for that crime).[8]

A no contest plea in a California criminal action, for purposes of the *Heck* analysis, has the same effect as a guilty plea or a jury verdict of guilty. *Nuno*, 58 F.Supp.2d

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[7] A cognizable § 1983 claim for damages for unreasonable search or seizure brought prior to the invalidation of the conviction also requires plaintiff to allege some "actual or compensable injury . . . which . . . does *not* encompass the 'injury' of being convicted and imprisoned." *Heck*, 512 U.S. at 487, n. 7. Plaintiffs must allege an injury apart from the mere fact of conviction or sentence. *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) 49 F.3d at 585. Rhead alleges personal injuries. Compl. ¶ 15.

[8] "[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, . . . and especially harmless error, . . . such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Heck*, 512 U.S. at 457, fn.7.

at 1135-113 ("the fact that plaintiff's obstruction of an officer conviction was by plea of *nolo contendere* does not have any effect on the application of the rule of *Heck*. . . . "); *see also Ove v. Gwinn*, 264 F.3d 817, 823, fn.4 (9th Cir. 2001); CAL. PENAL CODE § 1016(3).[9] The fact of the existence of the plea to a CAL. PENAL CODE § 148(a) charge prevents pursuit of a § 1983 claim for excessive force during the arrest. *Nuno*, 58 F.Supp.2d at 1136.

2. Excessive Force Claims

" '[A]ll claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard.' "[10] *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989). Law enforcement officers may use only such force to effect an arrest as is "objectively reasonable" under the circumstances. *Graham*, 490 U.S. at 397 ("[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"). Police officers are not limited to using the least intrusive degree of force possible. Rather, their conduct will be judged against a reasonable range of conduct in the

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[9] "[A] plea of *nolo contendere* shall be considered the same as a plea of guilty and that, upon a plea of *nolo contendere*, the court shall find the defendant guilty." CAL. PENAL CODE § 1016(3)

[10] "The less protective Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.' " *Graham*, 490 U.S. at 398-99 (citation omitted).

circumstances. *See Forrester*, 25 F.3d at 806; *Cunningham v. Gates*, 229 F.3d 1271, 1290 (9th Cir. 2000). CAL. PENAL CODE § 834a provides that citizens have a duty to "refrain from using force" to resist a lawful arrest.

In *Graham*, the Supreme Court identified factors relevant to the reasonableness inquiry under 42 U.S.C. § 1983 as "includ[ing] the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. However, the *Graham* analysis does not impose a rigid three-part test. The fact-finder is expected to consider "whether the totality of the circumstances justifies a particular sort of seizure." *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). Other "dangerous or exigent circumstances" existing at the time of the arrest are also considered. *Chew v. Gates*, 27 F.3d 1432, 1440-41, fn. 5 (9th Cir. 1994).

The "facts and circumstances" of every excessive force case vary, and a fact-finder's analysis of the "objective reasonableness" of the conduct under review requires commensurate flexibility. *Forrester* at 806, fn. 5. An assessment of reasonableness is inherently fact-specific. *See Chew*, 27 F.3d at 1443, 1440 ("[b]ecause questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury").

3. Summary Judgment

Summary judgment is properly granted when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

FED.R.CIV.P. 56(c). "A material issue of fact is one that affects the outcome of litigation and requires a trial to resolve the parties' differing versions of the truth." *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982). The court's function in deciding summary judgment motions is to determine whether triable issues exist, not to invade the fact-finder's function to resolve them. *Anderson*, 477 U.S. at 249-255.

The court need only consider evidence set out in the moving or opposing papers and parts of the record specifically referred to in those papers. *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Such evidence must be explicitly brought to the court's attention by designation and reference to specific triable facts. *Id.* at 1030.

The moving party has the initial burden of demonstrating that summary judgment is proper, based on the pleadings, depositions, affidavits, or other evidence, which the moving party "believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party can satisfy that burden either (1) by presenting evidence that negates an essential element of the non-moving party's case, or (2) by demonstrating that the non-moving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-323.

Once the moving party carries its burden, the burden shifts to the opposing party to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at 324. The opposing party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor. *See*

Anderson, 477 U.S. at 255; *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). The court may not weigh evidence or make credibility determinations. *Anderson*, 477 U.S. at 255. However, conclusory allegations are insufficient to defeat summary judgment. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). More than a "metaphysical doubt" is required to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party must "go beyond the pleadings and by [his or her] own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file.' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting FED.R.CIV.P. 56(c)); *see Berg*, 794 F.2d at 459; *Reese*, 208 F.3d at 738. When the historical facts controlling the application of a rule of law are not in dispute, the summary judgment motion raises a question of law for the court. *Delbon Radiology v. Turlock Diagnostic Ctr.*, 839 F.Supp. 1388, 1391 (E.D.CA 1993).

4. Admissible Evidence

The facts to support or defeat summary judgment must be admissible under rules governing the admissibility of evidence generally. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1989). Affidavits or declarations submitted in summary judgment proceedings must be based on personal knowledge, state evidentiary facts, and "show affirmatively that the affiant is competent to testify to the matters stated therein." FED.R.CIV.P. 56(e). Inadmissible hearsay or opinions are not competent evidence. Conclusory statements or allegations lacking factual support are insufficient. *National*

Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997). It is well settled that "unauthenticated documents cannot be considered in a motion for summary judgment." *Orr v. Bank of America*, ___ F.3d ___, 2002 WL 507525 (9th Cir. Cal. 4/5/02) at *3 and cited cases.

Testimony stenographically reported and offered into evidence at a later trial may be "proved by the transcript thereof duly certified by the person who reported the testimony." FED.R.CIV.P. 80(c); *see Orr*, 2002 WL 507525 at *5; *see also Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963) ("an uncertified copy of testimony is inadmissible in a summary judgment proceeding").

"In a summary judgment motion, documents authenticated through personal knowledge must be 'attached to an affidavit that meets the requirements of [Fed.R.Civ.P.] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.'" *Orr*, 2002 WL 507525 at *3 (footnotes omitted), quoting *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). In particular, "[a] deposition or extract therefrom is authenticated on a motion for summary judgment when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent." *Orr*, 2002 WL 507525 at *3; *see* FED.R.EVID. 901(b); FED.R.CIV. P.56(e), 30(f)(1); *Beyene v. Coleman Servs., Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988); *Pavone v. Citicorp Credit Servs., Inc.*, 60 F.Supp.2d 1040, 1045 (S.D.Cal. 1997) (excluding a deposition for lacking a signed certification from the reporter). "It is insufficient for a party to submit, without more, an affidavit from her counsel identifying the names of the deponent, the reporter, and the action and

stating that the deposition is a 'true and correct copy.'" *Orr,* 2002 WL 507525 at *3; *see Beyene*, 854 F.2d at 1182. "Such an affidavit lacks foundation even if the affiant counsel were present at the deposition." *Orr*, 2002 WL 507525 at *3. In addition, deposition testimony admissible as evidence in a summary judgment motion must not be hearsay or must fall within an exception to the hearsay rule. *Orr*, 2002 WL 507525 at *6.

B. Plaintiff Has Not Met His Burden To Demonstrate His Success On The Excessive Force Issue Would Not Impliedly Invalidate His Conviction

There is no dispute that Rhead's conviction for resisting arrest has not undergone any reversal, expungement, invalidity, or question. Rhead has an undisturbed conviction under CAL. PENAL CODE § 148(a). Rhead can only maintain a § 1983 claim if he could prove excessive force that would not necessarily imply the invalidity of his conviction. *See Heck*, 512 U.S. at 486-87; *Franklin*, 971 F.Supp. at 1335; *Susag*, 94 Cal.App.4th at 1410. Such a showing would require that some or all of the force must have occurred after his arrest and have been objectively excessive in the circumstances. If proof of any of Rhead's claims would necessarily imply the invalidity of his conviction for resisting arrest, each such claim must be dismissed. *Heck*, 512 U.S. at 486-87. If not, he may proceed with the action, absent some other bar.

The parties base their Motion and Opposition arguments on their differing assumptions regarding the timing of Rhead's arrest with respect to the injuries he received.

> Excessive force after an arrest is made does not destroy the lawfulness of the arrest. Sanford's conviction required that Motts be acting lawfully in the performance of his duties 'at the time the offense against him was committed.' . . . Hence, if Motts used excessive force subsequent to the time Sanford interfered with his duty, success in her section 1983 claim will not invalidate her conviction. *Heck* is no bar.

Sanford, 258 F.3d at 1120 (reversing a grant of summary judgment for defendants, finding if Sanford "could prove the punch was delivered after she was arrested," she could sue the officer).

Defendants assert Rhead was not "handcuffed" until, "by his own admission, other officers arrived on the scene and all the alleged 'excessive force' had been stopped, and plaintiff was subdued in the street." Reply 2:6-9. "The handcuffing, by plaintiff's own admission, occurred after all the alleged 'excessive force' occurred." Reply 4:14-16 (emphasis added). Defendants apply a bright line demarcation of handcuffing and placement in a patrol car as the effectuation of an arrest. "Plaintiff has simply attempted to define 'arrest' at a point in time earlier than the undisputed point at which plaintiff was handcuffed and put in the patrol car." Reply 7:5-7. Defendants do not provide affidavits or other evidence to substantiate a version of events different from those alleged by Rhead, basing their Motion on a question of law.

Defendants rely on *Susag*, 94 Cal.App.4th 1401 for the proposition that handcuffing – rather than "'under arrest'" in "some technical and legal sense" – is the appropriate "focus" for establishing the timing of use of force with respect to an arrest. Reply 5:24-6:3. Although *Susag*

involved police use of force while the plaintiff was handcuffed, the case does not stand for the proposition that handcuffing necessarily effectuates the arrest for *Heck* purposes. Nevertheless, the *Susag* plaintiff had a standing conviction for obstructing an officer. The *Susag* court held that conviction barred his state law claims for assault and battery, intentional inflection of emotional distress, and false imprisonment arising out of his arrest: "It is established that a person convicted of resisting or obstructing a peace officer (Pen. Code § 148), subd. (a)) may not maintain an action for the violation of federal civil rights (42 U.S.C. § 1983) . . . based on the officer's conduct ***during the arrest***, unless the conviction has been set aside through appeal or other postconviction proceedings." *Susag*, 94 Cal.App.4th at 1405-06 (emphasis added).

Rhead argues in opposition to the application of the *Heck* rule that excessive force was used *after* his arrest. Opp. pp. 5-7. He asserts he sues "for the beating he sustained at the hands of over zealous police officers ***after he had been placed under arrest*** and taken into custody." Opp. 4:28-5:3 (emphasis added). He asserts: "This was an unprovoked attack by defendant Hart after the detention and arrest and from the comment made by defendant Mundy as to the infraction." Opp. 13:17-19. Rhead's Opposition asserts he "will demonstrate that the facts that support his excessive use of force claim against the defendants were subsequent to his arrest, which are the facts that support his no[ ] contest plea." Opp. 3:12-14. Unfortunately, Rhead directs the court to no "specific facts" supported by admissible evidence to support his version of the timing of his arrest with respect to Defendants' allegedly unreasonableness conduct, as required to defeat summary judgment when the moving party has met its

initial burden. *See* FED.R.CIV.P. 56(e); *Berg*, 794 F.2d at 459. Rhead's Opposition is devoid of admissible evidence to support the promised demonstration, leaving only his conclusory allegation that he was under arrest at some point in time before all of the force had been applied. Conclusory allegations are inadequate to avoid summary judgment. *Berg*, 794 F.2d at 459.

The purported excerpts from Rhead's deposition provided as Exhibits 2-7 and 10 to the Opposition are not authenticated. His counsel's declaration that Exhibits "2" through "10" are "true and correct" copies is an inadequate foundation for admissibility. *See Orr*, 2002 WL 507525 at *3-4; *Beyene*, 854 F.2d at 1182; *Pavone*, 60 F.Supp.2d at 1045. The deposition excerpts do not identify the names of the deponent and the action and do not include certification by a court reporter. Although Defendants have submitted no affidavits regarding their version of the facts and circumstances surrounding the officers' conduct at material times, relying instead on the *Heck* rule of law barring 28 U.S.C. § 1983 challenges to standing convictions necessarily implying the invalidity of the conviction, Rhead has not met his burden to demonstrate that there are triable issues of fact whether the *Heck* rule bars his claims.

In further support of this result, the court finds the chronology alleged in Rhead's Complaint does not track his Opposition contentions. Rhead's Complaint alleges he was "stopped" by Officer Mundy, he was searched "after the stop" and after Officer Hart arrived. Compl. ¶¶ 8-9. He alleges he tried to run because he became afraid for his life while Officer Hart had him in a head lock and while Officer Mundy was holding his legs down, but fell while the officers continued to hit and spray him, demanding

that he remain still. Compl. ¶ 10. Even after the third officer showed up and jumped on him, Rhead alleges the officers "did not try and hand cuff him at this point." Compl. ¶ 10. He was "hand cuffed" and "put in [the] car" of the last two officers after those two got the other officers "to get off" Rhead. Compl. ¶ 10. His first cause of action characterizes those acts as ***causing him to suffer a "false arrest and unlawful search and seizure"*** "without a warrant or probable cause." Compl. ¶ 13 (emphasis added). "As a result of those acts", Rhead alleges he "was unlawfully ***beaten***, detained, ***arrested*** and criminally charged" in an "unlawful seiz[ure]". Compl. ¶ 13. He alleges "Plaintiff was ***beaten and arrested***" (Compl. ¶ 15), rather than "arrested and beaten." "This unreasonable and excessive force ***constituted an unlawful seizure.***" Compl. ¶ 14.

The only reasonable inference from the chronology of events in the Complaint allegations is that the injuries he sustained occurred during the course of his arrest. Rhead's Opposition argument that the excessive force occurred after his arrest is accordingly inconsistent with his complaint allegations regarding the timing of events, and is wholly unsupported by admissible evidence.

Rhead relies on *Sanford*, 258 F.3d 1117 to support his Opposition. However, that case is factually distinguishable from his circumstances. The plaintiff in *Sanford* had been arrested and handcuffed for assaulting an animal control officer. While she was still on the scene of that arrest, a police officer struck her in the face and knocked her to the ground following a verbal exchange while the officer was in the process of arresting Sanford's boyfriend. Sanford pled no contest to a CAL. PENAL CODE § 148(a) charge. She thereafter sued the police officer, the police department,

and the city alleging seizure in violation of 42 U.S.C. § 1983, denial of due process, First Amendment speech rights, and several state law torts, including assault and battery. *Sanford*, 258 F.3d at 1118-19.

The *Sanford* defendants argued the punch was the arrest for interfering with the boyfriend's arrest, whereas Sanford was already under arrest at the time for the assault on the animal control officer. *Sanford*, 258 F.3d at 1119-20. The Court of Appeal reversed summary judgment for defendants holding, *inter alia*, that plaintiff's case was not barred by *Heck*. That court found: "Accepting the defendants' position that Sanford was arrested and then convicted of interfering with [the police officer's] securing [of the boyfriend], the validity of her conviction is unaffected by her showing that [the officer] used excessive force." *Sanford*, 258 F.3d at 1120. "[N]othing in [Sanford's] testimony identifies the act of which [she] was convicted as being a resistance to [the officer's] punch," and "nothing in the record informs us what the factual basis was for Sanford's plea of *nolo contendere*." *Sanford*, 258 F.3d at 1120.

The *Sanford* court's reference to the "factual basis" of Sanford's plea appears to refer to the conduct constituting the resistance underlying the charge. Rhead contends he should be allowed to present evidence regarding why he pled *nolo contendere* to his resisting arrest charge. Unlike the *Sanford* plaintiff, even if Rhead were permitted to "explain the reasons for his no contest plea" (Opp. p.8), the relationship of his standing conviction for resisting arrest to the propriety of his bringing a 42 U.S.C. § 1983 action

would not change.[11] For example, Rhead suggests he was "forced to take" the plea "as a result of the false police reports filed against him," an allegation which, if true, could impliedly invalidate his conviction. Opp. 13:9-11. He thought at the time of the confrontation with police that "he was only going to get a $120 ticket." Opp. 12:22-23. He contends he had to take the plea because he did not want exposure to the 7 year prison sentence the original charges potentially carried. Opp. 2:8-10. He argues Defendants "offered no proof as to why [Rhead] plead no contest and to [*sic*] which facts he relied on." Opp. 7:27-28. The "reasons" for his plea are accordingly distinguishable from the "reasons" the *Sanford* court found could affect the timing of the use of force with respect to that plaintiff's arrests and hence the plaintiff's entitlement to sue under 42 U.S.C. § 1983. Opp. 7:27-28.

Defendants produced admissible evidence of Rhead's plea proceedings that on its face satisfies the *Heck* preclusion rule. Mot. Ex. "A"; Reply Ex. "A". An element of a CAL. PENAL CODE § 148 conviction is that the officers were

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[11] Even if Rhead were referring to the conduct constituting his resistance that he should be able to "explain" as "the reasons for his no contest plea" to section 148, his reliance on *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal.2d 601 (1962) and *People v. Goodrum*, 228 Cal.App.3d 397 (1991) is misplaced. *See* Opp. p. 8. "The problem with these arguments [under *Teitelbaum Furs* and *Goodrum*] is that the *Heck* rule of preclusion does not depend on the content of California's law of collateral estoppel. Regardless whether, as a matter of California law, a plaintiff could litigate, in a state civil action against these defendant, [sic] the factual circumstances of his arrest and resulting nolo plea, he may not do so via a section 1983 damages action while his obstruction of an officer conviction stands unimpaired." *Nuno*, 58 F.Supp. at 1137.

performing their lawful duties at the time of the arrest. *See Susag*, 94 Cal.App.4th at 1408; *Nino*, 58 F.Supp. at 1133. Rhead admitted through his plea that he resisted arrest. He has not met his burden to raise any triable issue of material fact supported by admissible evidence to circumvent the operation of the *Heck* rule. *Celotex*, 477 U.S. at 324. He is precluded, while that conviction stands, and irrespective of his rationale for entering the plea, from pursuing his 42 U.S.C. § 1983 claims, because success on the merits would impliedly invalidate his conviction. *Nuno*, 58 F.Supp.2d at 1136. Accordingly, the Motion with respect to the Count One excessive force claim, and Count Two to the extent liability of the entity defendant is predicated on Rhead's success with respect to the individual defendants on the Count One claim, is ***GRANTED***.

C. Judgment For Rhead On Claims Of "Malicious Prosecution" And "False Arrest" Would Necessarily Imply Invalidity Of His Conviction

In addition to his "excessive use of force" claim, Rhead's First Cause of action asserts a "malicious prosecution" and a "false arrest" claim in violation of his due process rights. He alleges the result was "unlawful seiz[ure] by Defendants without a warrant or probable cause" and "false arrest and unlawful search and seizure," as well as false accusations of battery on an officer by Defendants and their filing of a "false police report." Compl. ¶ 13.

The rationale and result regarding Rhead's excessive force claim similarly dispose of his due process claims in Count One. Rhead cannot bring these claims while his resisting arrest conviction stands. *Heck*, 512 U.S. 475; *see*

Cabrera v. City of Huntington Park, 159 F.3d 374, 380 (9th Cir. 1998) (holding *Heck* barred plaintiff's false arrest and imprisonment claims until conviction was invalidated); *Smithart*, 79 F.3d at 952 (holding the *Heck* rule barred plaintiff's claims that defendants lacked probable cause to arrest him).[12] To prevail on claims of malicious prosecution, false arrest, and conviction based on false police report, Rhead would need to impugn essential elements of his resisting arrest conviction. Rhead as the non-moving party would have had to "go beyond the pleadings and by [his or her] own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting FED.R.CIV.P. 56(e)). He has designated no such "specific facts" nor has he supported his arguments with admissible evidence. The

[12] The *Smithart* plaintiff had been convicted of assault with a deadly weapon for driving his truck at a county sheriff a highway patrol officer, a crime that preceded an alleged beating the officers gave him after he had gotten out of the vehicle. Plaintiff brought a federal § 1983 lawsuit, alleging first, that he had been arrested without probable cause and had unfounded criminal charges brought against him, and second, that he had been the victim of excessive force during the arrest. The *Smithart* court held plaintiff's claim that he was arrested without probable cause was barred by *Heck* because it would necessarily imply the invalidity of the conviction, but that the excessive force claim was not. However, the *Heck* rule did not bar plaintiff's excessive force claim under § 1983 because success on that claim would not be "fundamentally inconsistent" with the assault with a deadly weapon conviction. *Smithart*, 79 F.3d at 952. "Even if plaintiff recovered a judgment for damages for excessive force, the validity of his underlying guilty plea and conviction would not be affected." *Smithart*, 79 F.3d at 952. "[A] conviction for assault with a deadly weapon under Nevada law does not have as an essential element that the peace officer (if any) be performing his duties so that the use of excessive force during arrest must necessarily invalidate the conviction." *Franklin*, 971 F.Supp. at 1336.

court declines to exercise supplemental jurisdiction over Rhead's Count Four state law claim of false arrest. Accordingly, the court ***GRANTS*** Defendant's Motion with respect to Rhead's claims for false arrest and malicious prosecution.

D. Battery And Negligence Claims

Count Three alleges a state law negligence cause of action, and Count Five a state law battery cause of action. The same evidentiary showing is required to prevail on state law battery claims as to prevail under 42 U.S.C. § 1983: "To make a prima facie case for either battery by a police officer [under state law] or violation of section 1983, the plaintiff must demonstrate the unreasonableness of the force used." *Susag*, 94 Cal.App.4th at 1413, 1405-06 (holding "for public policy reasons, relief from a conviction under Penal Code section 148, subdivision (a) is also a prerequisite of state law battery and related claims arising from the alleged use of excessive force during the arrest)" (emphasis added); *see Saman v. Robbins*, 173 F.3d 1150, 1156-57 (9th Cir. 1999) (section 1983 and state law battery claims require same evidentiary showing). For the same reasons Rhead cannot maintain his 42 U.S.C. § 1983 excessive force claim, his battery claim also fails.

The issue of entity liability depends on the officers' liability. Defendants' request for summary judgment for the police department is derivative of and depends on their success with respect to the individual Defendants on the remaining claims. Supervisors can be liable under § 1983 for their own culpable conduct or inaction with respect to training or control of subordinates or acquiescence in the constitutional injuries complained of and if such conduct

led to the injuries. *Monell*, 436 U.S. at 690-91 (holding the public entity itself may be held liable for a violation of federal law under 42 U.S.C. § 1983 only if the county has adopted an illegal or unconstitutional policy or custom, and that a plaintiff may recover from the city entity only if the established injury was inflicted pursuant to city policy, regulation, custom, or usage).[13] No facts are before the court identifying any particular policy or practice of the City of Carlsbad Police Department Rhead contends is actionable. *See Fitzpatrick v. Gates*, 2001 WL 630534 (C.D. Cal. April 18, 2001).

Under California law, in contrast to federal law, public entity liability may be found on a theory of *respondent superior*. *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002) ("Under California law, the county's immunity depends upon whether the police officers are immune. . . . California denies immunity to police officers who use excessive force in arresting a suspect. . . . Public employees [and the county] are similarly not entitled to immunity in suits for false arrest or false imprisonment"). However, as Rhead's claims against the individual Defendants do not survive summary judgment, as a matter of law no *respondent superior* liability may be found.

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[13] City policy "need only cause [the] constitutional violation; it need not be unconstitutional per se." *Jackson v. Gates*, 975 F.2d 648, 654 (9th Cir. 1992).

III. CONCLUSION AND ORDER

For the foregoing reasons, **IT IS HEREBY ORDERED**:

1. Defendants' Motion is ***GRANTED***; and

2. Rhead's claims are ***DISMISSED WITHOUT PREJUDICE*** to future demonstration that his conviction has been invalidated.

IT IS SO ORDERED.

Dated: 4-10-02

/s/ Larry A. Burns
HONORABLE
LARRY A. BURNS
United States
Magistrate Judge

cc: MAGISTRATE JUDGE LEO S. PAPAS
ALL COUNSEL OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MORGAN RHEAD, Plaintiff-Appellant, v. J. MUNDY; J. EASTMAN; G. HART; CITY OF CARLSBAD POLICE DEPARTMENT, Defendants-Appellees.	No. 02-55817 D.C. No. CV-01-00629-LAB Southern District of California, San Diego ORDER (Filed Sep. 11, 2003)

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

Judge W. Fletcher and Judge Rawlinson have voted to deny the Appellee's petition for panel rehearing filed August 15, 2003. Judge Silverman has voted to grant it.

The panel has voted unanimously to deny the petition for rehearing en banc. The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.